OWNERS OF CARGO LATELY LADEN ON BOARD THE SHIP OR VESSEL "VISHVA APURVA"

v.

OWNERS OF AND OTHER PERSONS INTERESTED IN THE SHIP OR VESSEL "KALIDAS"

HIGH COURT, SINGAPORE
FA CHUA J
[ADMIRALTY IN REM NO. 230 OF 1988]
29 JANUARY 1991

CONFLICT OF LAWS: *Bill of lading - Foreign jurisdiction clause - Proceedings commenced in Singapore and India - Application for stay of Indian proceedings - Grounds - Exceptional circumstances - Discretion of Court - Principles in The Eleftheria - Onus - Strong cause to warrant a refusal of stay - Delay in trial in India - Whether real connection with India - Witnesses - Delay will cause memory to fade - Convenience - Defendants also commenced in rem action in Singapore - Indication that amenable to Singapore jurisdiction - Law in India uncertain - Hague Visby Rules - Inability to recover party-party costs in India - Stringent foreign exchange controls - Difference in amount in limitation of owners' liability - High Court (Admiralty Jurisdiction) Act [Sing] s. 3(1)(g).*

A collision occurred on the Red Sea between the "Vishva Apurva" (VA) which was owned by the defendants and the Greek ship "Dias" (D) as a result of which "Vishva Apura" sank with her entire cargo. The plaintiffs commenced the present proceedings in Singapore against the defendant on 5 August 1988 for damages in respect of the total loss of the plaintiffs' cargo on board the VA (Singapore suit). Also on 5 August 1988, Pohjola Insurance Co. instituted proceedings against the defendants in the High Court of Bombay in respect of their subrogated claims under certain bills of lading issued in respect of the plaintiffs' cargo (the Bombay suit).

The bill of lading issued in respect of the plaintiffs' cargo contained a jurisdiction clause which stipulated that the bill of lading was to be governed by the law of India and that any dispute arising thereunder should be determined by the Indian Courts according to that law to the exclusion of the jurisdiction of the Courts of any other country.

The defendants applied for a stay of the proceedings in the Singapore suit but this was dismissed by the Assistant Registrar. This was the appeal against that decision. The question for determination is whether this action ought to be stayed in view of the foreign jurisdiction clause in the bills of lading.

Held:

[1] The Court had a wide discretion whether to grant a stay in cases where there is a foreign jurisdiction clause. The Court in exercising its discretion whether to grant stay must take into account all the circumstances of the particular case. The plaintiffs must show that the facts and circumstances of the case are so exceptional as to amount to a strong cause and to warrant a refusal of stay, that is, to continue to hear the matter in Singapore under s. 3(1)(g) of the High Court (Admiralty Jurisdiction) Act despite the existence of the foreign jurisdiction clause in the bill of lading.

[2] It has been clearly shown by the plaintiffs that if the case were to proceed in the Indian Court, they will be a considerable delay before it came up for trial whereas the Singapore trial has been set down for trial on 6 September 1990. Such delay as would occasion in the Bombay trial would amount to a denial of justice.

[3] The fact that the Singapore proceedings have been under way for a substantial time and have involved the parties in substantial costs and are ready for trial, was a strong factor in favour of the grant of stay of the Indian proceedings.

[4] There is evidence to show that a successful litigant in India will not be able to recover party and party costs or even costs on a realistic basis. If this case should proceed to litigation in Bombay, and should the plaintiffs succeed in the action, the maximum amount of costs recoverable by them from the defendants is limited to 38,500 rupees. Therefore, substantial justice would not be done if this case were to proceed in the Indian Court as the success of the plaintiffs in monetary terms would necessarily and substantially be diminished as they would have to pay much higher costs than in Singapore.

[5] The effect of costs is relevant in considering juridical disadvantage as a successful litigant who is resident outside India, will have to wait for a further period of nine months to one year before he is paid. A judgment debtor will, owing to exchange control, have to apply for and obtain permission for remittance of monies outside India in satisfaction of the judgment sum.

[6] The matter as regards the higher costs in India and the stringent foreign exchange controls was another factor which would be to the detriment of the plaintiff.

[7] An application for stay on the grounds that parties have agreed to submit the dispute to a foreign Court should be brought without delay after the service of the writ. In this case, there was unreasonable delay by the defendants.

[8] On the evidence and facts of this case, it would be of greater convenience and would incur less expenses for the parties as regards the evidence pertaining to this case if the case is heard in Singapore. Further, even if most of the evidence, convenience and advantage is in proceeding in Bombay, it is rendered nugatory by the excessive delay faced by litigants in Bombay.

[9] Oral evidence of eye witnesses to the collision is of utmost importance. With delays their memory may fade and the longer the delay the less chance there is of the evidence being convincing. Delay in India will have a significant effect on the location of evidence as witnesses may die or may no longer be able to be located. All these factors will seriously prejudice the plaintiffs if their action in Singapore is stayed.

[10] Further, the defendants commenced *in rem* action in Singapore against the "Dias"after the plaintiffs commenced their action in Singapore on 5 August 1988, and after they had filed their stay summons on 20 January 1988. This was another indication that they regarded Singapore as an acceptable forum, that they do not genuinely desire trial in India and that the defendants are only after a procedural advantage in India where the limitation is lower.

[11] There is some doubt as to the law which an Indian Court will apply in determining this suit. Although the Hague Rules apply to India, the Hague Visby Rules are inapplicable as India had not ratified the relevant 1961 Brussels Protocol. Singapore Courts have always applied the Hague Rules under the Singapore Carriage of Goods Ordinance which gives effect to the Hague Visby Rules.

[12] As to the defendants' contention that none of the parties to the proceedings have any real connection with Singapore, it is clear that the plaintiffs are not all Indians. They reside in Finland, Netherlands and other European countries. It cannot therefore be said that the country with the closest connection is India.

[13] It would be unjust to deprive the plaintiffs of the Singapore limitation of owner's liability which amounts to US$769,832.38 when the limit under the Indian Merchant Shipping Act is only US$353,000 in India. Furthermore, as the limitation fund created *ex-parte* in India has been set aside, the defendants would have to start all over again for it to be constituted.

[Appeal for stay dismissed.]

[**Editor's Note:** The defendants' have lodged an appeal to the Court of Appeal.]

Cases referred to:
Amerco Timbers Pte Ltd. v. Chatsworth Timber Corp. Pte Ltd. [1977] 2 MLJ 181 ***(cons)***
Roneleigh Ltd. v. MII Exports Inc [1989] 1 WLR 619 ***(cit)***
The "Biskra" [1983] 2 Lloyd's Rep 59 ***(cit)***
The "El Amria" [1981] 2 Lloyd's Rep 119 ***(cit)***
The "Eleftheria" [1969] 1 Lloyd's Rep 237 ***(cons)***
The "Indian Fortune" [1985] 1 Lloyd's Rep 345 ***(cit)***
The "Sidi Bishr" [1987] I Lloyd's Rep 42 ***(cit)***
The "Vishva Ajay" [1989] 2 Lloyd's Rep 558 ***(cit)***
The "Volvox Hollandia" [1988] 2 Lloyd's Rep 361 ***(cit)***

Legislation referred to:
Civil Law Act [Sing], s. 5
High Court (Admiralty Jurisdiction) Act (Cap 123) [Sing], s. 3(1)(g)
Rules of the High Court [Ind], r. 606

For the plaintiffs - Belinda Ang
For the defendant - Lawrence Boo

JUDGMENT

FA Chua J:

The plaintiffs' claim is for damages in respect of the total loss of the plaintiffs' cargo shipped on board the defendants' ship the "Vishva Apurva" of the port of Bombay pursuant to bills of lading numbered 2 (Yxpila, Finland, to Madras) and 11 (Yxpila to Bombay).

The loss arose out of the collision in the Red Sea on or about 6 August 1987, between the "Vishva Apurva" and the Greek ship the "Dias". Following the collision the "Vishva Apurva" sank with her entire cargo.

The plaintiffs commenced the present proceedings in Singapore on 5 August 1988, and seized the defendants' ship the "Kalidas".

Proceedings were instituted against the defendants on 5 August 1988, in the High Court of Bombay on behalf of Pohjola Insurance Co. Ltd. in respect of theirs subrogated claims under the bills of lading numbered 2 and 11 issued in respect of the plaintiffs' cargo (Suit No. 2567 of 1988).

The defendants are The State Shipping Corporation of India Ltd., a government company incorporated under the Indian Companies Act 1956 with their registered office in Bombay.

The bills of lading issued in respect of the plaintiffs' cargo contain the following clause:

> 17. Jurisdiction Clause: The contract evidenced by this bill of lading shall be governed by the law of India and any dispute arising hereunder shall be determined by the Indian Courts according to that law to the exclusion of the jurisdiction of the Courts of any other country.

The defendants applied by Summons-in-Chambers No. 4151 of 1989 for a stay of all further proceedings in this action. The summons was dismissed by the Assistant Registrar on 6 February 1990. The defendants filed a notice of appeal to the Judge in Chambers on 9 February 1990.

The appeal came before me on 15 October 1990 and I dismissed the appeal with costs. The defendants have filed a notice of appeal to the Court of Appeal.

I now give my reasons.

It is not in dispute that this Court has jurisdiction to entertain in Singapore the plaintiffs' claim against the defendants under s. 3(1)(g) of the High Court (Admiralty Jurisdiction) Act (Cap 123).

The question for determination is whether this action ought to be stayed in view of the foreign jurisdiction clause in the bills of lading.

It is also not in dispute that this Court has a wide discretion in deciding whether to hear the parties to this action or whether to uphold the foreign jurisdiction clause and stay the action. In deciding such questions the Singapore Court has recourse to English law and the practice followed by the Courts in England, unless in any case other provision is made by any law in force in Singapore (s. 5 of the Civil Law Act (Cap 43)).

In England, the principles are enunciated in the leading judgment of Brandon J in *The "Eleftheria"* ([1969] 1 Lloyd's Report 237 at p. 242), in which he summarised what appeared to him to be the principles established by the authorities which had been cited to him. The principles are:

(1) Where plaintiffs sue in England in breach of an agreement to refer disputes to a foreign Court, and the defendants apply for a stay, the English Court, assuming the claim to be otherwise within the jurisdiction, is not bound to grant a stay but has a discretion whether to do so or not.

(2) The discretion should be exercised by granting a stay unless strong cause for not doing so is shown.

(3) The burden of proving such strong cause is on the plaintiffs.

(4) In exercising its discretion the Court should take into account all the circumstances of the particular case.

(5) In particular, but without prejudice to (4), the following matters, where they arise may be properly regarded:

(a) In what country the evidence on the issues of fact is situated, or more readily available, and the effect of that on the relative convenience and expense of trial as between the English and foreign Courts.

(b) Whether the law of the foreign Court applies and, if so, whether it differs from English law in any material aspects.

(c) With what country either party is connected, and how closely.

(d) Whether the defendants genuinely desire trial in the foreign country, or are only seeking procedural advantages.

(e) Whether the plaintiffs would be prejudiced by having to sue in the foreign Court because they would (i) be deprived of security for that claim; (ii) be unable to enforce any judgment obtained; (iii) be faced with a time-bar not applicable in England; or (iv) for political, racial, religious or other reasons be unlikely to get a fair trial.

In Singapore, the Court of Appeal in the *Amerco Timbers Pte Ltd. v. Chatsworth Timber Corp. Pte Ltd.* ([1977] 2 MLJ 181) stated the principles in words very similar to that of *The "Eleftheria"*. Kulasekaram J (delivering the judgment of the Court) said (p. 181):

> The law concerning an application for a stay is clear. Where a plaintiff sues in Singapore in breach of an agreement to submit their disputes to a foreign Court, and the defendant applies for a stay, the Singapore Court, assuming the claim to be otherwise within its jurisdiction, is not bound to grant a stay but has a discretion whether to do so or not. The Court in exercising its discretion should grant the stay and give effect to the agreement between the parties unless strong cause is shown by the plaintiff for not doing so. To put it in other words the plaintiff must show exceptional circumstances amounting to strong cause for him to succeed in resisting an application for a stay by the defendant. In exercising its discretion the Court should take into account all the circumstances of the particular case. In particular, the Court may have regard to the following matters, where may arise:
>
> (a) In what country the evidence on the issues of fact is situated or more readily available, and the effect of that on the relative convenience and expense of trial as between the Singapore and foreign Courts.
>
> (b) Whether the law of the foreign Court applies and, if so, whether it differs from Singapore law in any material respects.
>
> (c) With what country either party is connected and, if so, how closely.
>
> (d) Whether the defendants genuinely desire trial in the foreign country, or are only seeking procedural advantages.
>
> (e) Whether the plaintiffs would be prejudiced by having to sue in the foreign Court because they would:
>
> (i) be deprived of security for their claim;
>
> (ii) be unable to enforce any judgment obtained;
>
> (iii) be faced with a time-bar not applicable here; or
>
> (iv) for political, racial, religious or other reasons be unlikely to get a fair trial.

In determining this appeal, I bore in mind that there is a *prima facie* case for a stay arising from the foreign jurisdiction clause. The plaintiffs must be bound by the foreign jurisdiction clause which they have agreed to. But this Court has a discretion to refuse an application for a stay if the facts and circumstances of the case are so exceptional as to amount to strong cause to the contrary. The burden lies with the plaintiffs.

The plaintiffs have shown that the facts and circumstances of the case are so exceptional as to amount to strong cause and to warrant a refusal of stay.

It has been clearly shown by the plaintiffs that if the case were to proceed in the Indian Court there will be very considerable delay (of at least 10 years) before the matter comes to trial, by comparison with its determination by the Singapore Court. The Singapore action has been set down for trial on 6 September 1990.

Very great delay in the hearing of an action seems to me to be a denial of justice. Serious delay is a factor which should be taken into consideration (see *The "El Amria* ([1981] 2 Lloyd's Rep 119); *The "Sidi Bishr"* ([1987] I Lloyd's Rep 42); *The "Vishva Ajay"* ([1989] 2 Lloyd's Rep 558)).

The fact that the Singapore proceedings have been under way for a substantial time and have involved the parties in substantial costs and are ready for trial, is a strong factor in favour of the grant of stay of the Indian proceedings (see p. 14 Supplement to 1988 White Book).

The plaintiffs have adduced evidence that a successful litigant in India will not be able to recover party and party costs or even costs on a realistic basis. Party and party costs was abolished in India on 1 January 1977. The amount of costs recoverable by a successful litigant in the Bombay High Court is governed by r. 606 of the Rules of the High Court on its original side. The amount recoverable under r. 606 is based on the quantum of the claim but there is a ceiling to the amount of advocate's fees recoverable from the other side which is presently fixed at 38,500 rupees. If this case should proceed to litigation in Bombay, and should the plaintiffs succeed in the action, the maximum amount of costs recoverable by them from the defendants is limited to 38,500 rupees.

It seems to me that substantial justice would not be done if this case were to proceed in the Indian Court as the success of the plaintiffs in monetary terms would necessarily and substantially be diminished as they would have to pay much higher costs than in Singapore. The effect of costs is relevant in considering juridical disadvantage (see *Roneleigh Ltd. v. MII Exports Inc* ([1989] 1 WLR 619).

The plaintiffs have adduced evidence that a successful litigant who is resident outside India, will have to wait for a further period of nine months to one year before he is paid. A judgment debtor will, owing to exchange control, have to apply for and obtain permission for remittance of monies outside India in satisfaction of the judgment sum. Some of the cargo claims against the defendants in India are brought by foreign insurers in exercise of subrogation rights and exchange control approval must be sought before payment can be made outside India.

The defendants say that the plaintiffs have the security of the defendants' P & I Club, London Steamship Owners' Association Ltd. which undertook to make payment on the plaintiffs obtaining final judgment in India or Singapore. Enforcement of any judgment whether obtained in India or Singapore would be against the London P & I Club for which no exchange control restrictions exist.

That might be so but the guarantee is only enforceable in the event the defendants failed to pay. Still the plaintiffs will have to wait and see if they will be paid.

The plaintiffs must have been aware of the exchange control in India when the contract was made. It is still of significance albeit marginal (see *The "Indian Fortune"* ([1985] 1 Lloyd's Rep 345).

There has been delay on the part of the defendants in applying for a stay of proceedings.

The defendants did not take out the application until after the plaintiffs had filed their statement of claim in which they claimed the sum of US$1,635,329.85

The writ was issued on 5 August 1989. The "Kalidas" arrived in Singapore in January 1989 and was arrested and the writ was served on 11 January 1989. The "Kalidas" was released on 12 January 1989, on the defendants providing security for the plaintiffs' claim by way of letter of undertaking dated 27 January 1989, issued by the London Steamship Owners' Association Ltd. for US$4.5 million, which covers any judgment which may be made against the defendants in the High Court of Singapore or the High Court of Bombay. The defendants entered appearance on 23 February 1989. The statement of claim was filed on 3 June 1989. The defendants applied for stay on 20 July 1989.

An application for a stay on grounds that the parties have agreed to submit the dispute to a foreign Court should be brought without delay after the service of the writ (see *The "Biskra"* ([1983] 2 Lloyd's Rep 59); *The "Sidi Bishr"* ([1987] 1 Lloyd's Rep 42).

The defendants say that their solicitors had informed the plaintiffs' solicitors shortly after the arrest of the vessel in January 1989 of the defendants' intention to apply for a stay and such intentions were repeatedly made known to the plaintiffs' solicitors. The reason that the defendants did not file the application earlier was due to the voluminous documents that had to be collated from Court files in Bombay and the defendants' agents all over Europe.

I am not convinced that it would take such a long time for the defendants to collate all the relevant documents to be exhibited to their affidavit to be filed in support of their application for stay. I am satisfied that there was unreasonable delay by the defendants after the writ was served.

The plaintiffs had loaded their cargo at Yxpila, Finland, for discharge in Madras and Bombay. The defendants say that evidence of the cargo volume and condition at the time of loading would not be in Singapore. As the cargo was not discharged here nor did the collision take place in Singapore, no evidence on such issues of fact as to the seaworthiness of The "Vishva Apurva" would be available in Singapore. All these would have to be brought into this jurisdiction.

The defendants say that they had following the collision despatched surveyors and experts to investigate and all these evidence and documents pertaining to the voyage and operations are readily available in India. The defendants do not dispute that in this modern age, surveyors and experts and documents of records can all be transported here and this problem is thus not insuperable. However, the defendants say that it is clear that none of these would be available in Singapore without considerable inconvenience and expense.

The defendants say that all evidence on issues of fact are not in Singapore and would be more readily available in India. This, submit defendants, is a significant consideration.

So far as ship's witnesses are concerned, ship's officers and crew are probably at sea and it is likely that for them there is no significant difference so far as convenience or expense is concerned between travelling to Singapore or India. As to ship's witnesses who are in the employment of the defendants there would be no difficulty for the defendants to get them to attend this Court as the defendants' vessels call in Singapore regularly. The defendants would not be put to any inconvenience or extra expense.

The defendants have commenced *in rem* action on 27 July 1989, in Singapore against "Dias" (Admiralty in Rem No. 343 of 1989) for the collision. This step was taken by the defendants well after the plaintiffs commenced the present action against the defendants (5 August 1988) and after the defendants filed their application for stay on 20 June 1989. This shows that there is evidence in Singapore and/or that the defendants are prepared to and can bring the evidence they have to Singapore. It also shows that the defendants regard Singapore as acceptable forum. In the event the defendants managed to arrest the "Dias" in South Africa only because the "Dias" did not call at Singapore after the collision.

It is not absolutely correct for the defendants to contend that most if not all evidence and documents" pertaining to the voyage and operations of the "Vishva Apurva" are readily available in India, for the purposes of determining the issues in the dispute.

The defence filed in this action put the plaintiffs to strict proof of their title to sue. The plaintiffs' contention is that the "Vishva Apurva" was improperly manned and equipped or supplied or that the owners had failed to exercise due diligence to make the ship seaworthy and that she sank not because of the collision but by reason of her unseaworthiness.

The plaintiffs say they intend to call as witnesses the Danish Master and crew of the "Alice Riis" who saw and took photographs of the "Vishva Apurva" as she sank. Witnesses at ports of loading as well as from one or more of the loading ports where some repairs to the "Vishva Apurva" were carried out will also be called.

The plaintiffs say that insofar as there is any dispute as to the plaintiffs' right to claim damages evidence of quantum of claim will have to brought from Finland.

Even if most of the evidence is in India, the convenience and advantage in proceeding in Bombay is rendered nugatory by the excessive delay faced by litigants in Bombay.

Oral testimony of eye-witnesses is of utmost importance. With delays their memory may fade and the longer the delay the less chance there is of the evidence being convincing. Delay in India will have a significant effect on the location of evidence: witnesses may die or no longer can be found. All of which will seriously prejudice the plaintiffs if their action in Singapore is stayed.

The defendants say that the jurisdiction clause in the bills of lading is not a jurisdiction clause *per se* but also stipulates that the governing law to be the law of India. The defendants submit that there is a distinct advantage which an Indian Court has in determining its own law.

There appears to be some doubt as to the law the Indian Court will apply. The Hague Rules are applicable in India by virtue of the Indian Carriage of Goods by Sea Act 1925. The defendants in the defences filed in India have denied that "in view of the alleged contract of carriage, the dispute is covered by the provisions of Carriage of Goods by Sea Act 1925." The position under the Indian law is uncertain since the Indian Carriage of Goods by Sea Act 1925, applies only to shipments out of India.

The Hague Visby Rules do not apply in India as India has not ratified the relevant 1961 Brussels Protocol. Singapore applies the Hague Visby Rules.

The Indian Court may decide that as the Indian Carriage of Goods by Sea Act do not apply and that by clause 17 of the bill of lading all disputes "shall be determined by the Indian Courts according to that law" then no Hague or Hague Visby Rules will be applicable. The legal position in India is uncertain.

It is clear that in general, and other things being equal, it is more satisfactory for the law of a foreign country to be decided by the Courts of that country. But all things are not equal in the present case. Singapore Courts have always applied the Hague Rules under the Singapore Carriage of Goods Ordinance prior to the enactment of the Carriage of Goods by Sea Act 1972 which gives effect to the Hague Visby Rules.

Following the casualty, the defendants were confronted with numerous claims by cargo owners for the loss of their cargo. On 28 June 1988, the defendants commenced limitation proceedings under the Indian Merchant Shipping Act 1958 (Admiralty No. 17 of 1988) seeking a declaration that their liability be limited to Rupees 5,252,241.50. By order of Court dated 9 August 1988, the High Court at Bombay ordered and directed that the defendants deposit with the Admiralty Registrar of the High Court, Bombay, the sum of Rupees 5,252,241.50 or

furnish a bank guarantee for the same sum to constitute as the limitation fund of the "Vishva Apurva". Pursuant to the said order, the defendants furnished a banker's guarantee in the sum of Rupees 5,252,241.50 on 19 August 1988, to abide by the further outcome of the proceedings in Admiralty No. 17 of 1988.

The application of the defendants, Admiralty No. 17 of 1988, was made *ex parte*. On 30 November 1988, notice of motion was filed by insurers (Berlin) and the reinsurers (Prague) of some of the cargo loaded on board the "Vishva Apurva", to set aside the order of 9 August 1988. The hearing of the said notice of motion was adjourned several times in 1989 and was only fully heard on 25 June 1990, together with the notice of motion filed by Hindustan Shipyard Ltd., one of the consignees, which had also applied for the order of 9 August be set aside or stayed. Judgment was delivered on 5 July 1990, setting aside the order of 9 August 1988.

The learned Judge was of the view that the order of 9 August 1988, establishing an interim Limitation Fund, "is clearly without any provision of any law or of any rule of this High Court". He said:

> It is a matter of substantive law and in the absence of any provision for the purpose of an interim Limitation Fund, it is not possible for me to grant any such relief. The fundamental assumption when the Court constitutes a Limitation Fund is that the plaintiffs are not at fault. That fact will have to be established and then only the Court can proceed with the constitution of any such fund.

The plaintiffs say that the limitation of owners' liability under the Singapore Merchant Shipping Act (Cap 179) for loss of or damage to goods where the loss or damage occurred without their actual fault or privity would be higher than the limitation under the Indian Merchant Shipping Act. In the present case the limits of the defendants' liability in Singapore would be approximately S$1,485,776.50 or equivalent approximately to US$769,832.38 as against Rupees 5,252,241.50 or equivalent approximately to US$353,000 in India. The defendants have not disputed these figures.

If a stay is granted the plaintiffs would lose the certainty of the Singapore limit of approximately US$769,832.38 It would be unjust to the plaintiffs to deprive them of the Singapore limit.

The defendants say that none of the parties to these proceedings have any real connection with Singapore. The plaintiffs would either be the Finnish shippers or the Indian consignees with places of business in their own country. Whereas, the defendants are an Indian Government Company with headquarters in Bombay. The "Vishva Apurva" is registered in India and was crewed by Indian nationals. Apart from the fact that the defendants' ship "Kalidas" was served with the writ and that their ships call at Singapore regularly as part of their worldwide trade there is no real connection by and of the parties in this dispute with Singapore.

The plaintiffs are not all Indians. They reside in Finland, Netherlands and other European countries. It cannot be said that the country with the closest connection is India.

The defendants say that their genuine desire for trial in India is well demonstrated by the active steps taken by them both in India and elsewhere. The defendants had wasted no time in setting up the Limitation Fund (albeit now set aside); provided securities both to abide by Indian and foreign Court judgments; advertised actively all over Europe inviting potential interests to lay claims in Bombay; taken steps to expedite the trial of the limitation action in Bombay.

It appears to me that the defendants have no genuine desire for trial in India. They were seeking a procedural advantage when they wasted no time in commencing limitation proceedings under the Indian Merchant Act 1958. They did not issue stay summons until after the plaintiffs had filed their statement of claim which indicates that they do not mind Singapore jurisdiction. The defendants commenced *in rem* action on 27 July 1989, in Singapore against the "Dias", the other vessel involved in the collision, well after the plaintiffs commenced their action in Singapore on 5 August 1988 and after the defendants filed their stay summons on 20 January 1988. This is very indicative that they regard Singapore as an acceptable forum and shows that the defendants are only after a procedural advantage in India where the limitation is lower and do not genuinely desire trial in India.

The plaintiffs say that the Indian action Suit No. 2567 of 1988 commenced on behalf of Pohjola Insurance Co. Ltd. was solely to protect the right for enforcement of those claims from being extinguished following the defendants' refusal to extend time beyond the one year time limit. Further, it is the advice of the solicitors of the Insurance Co. that under Indian law, it is not possible by agreement between a shipowner and cargo claimants to validly extend the one year time limit prescribed by law for commencing legal proceedings. Under Indian law there is no procedure by way of a mere issuance of a writ to protect the right for enforcement of the claims from being extinguished. It is necessary for a claimant to file a suit by lodging a complaint with full statement of claim incorporated therein. Apart from filing the suit and serving the writ of summons on the defendants on 7 October 1988, the Insurance Co. as plaintiffs took no further steps in these proceedings.

Although some defences have been filed recently the proceedings in India can be regarded as at initial stages. Limitation action is a separate matter from the cargo claim. Now that the limitation fund created *ex parte* has been set aside, the defendants would have to start all over again for it to be constituted and it would this time be contested. It is not necessarily unjust or inconvenient for liability and limitation to be tried separately (see *The "Volvox Hollandia"* ([1988] 2 Lloyd's Rep 361).

The defendants say that in exercising its discretion, the Court here must take into account the multiplicity of actions here and in India. The Indian Courts are already seized with a vast majority of the cargo claims arising out of the casualty. The main and real issue in the Indian actions and these proceedings that would ultimately determine the case is whether or not the "Vishva Apurva" was unseaworthy and/or whether the defendants had actual fault or privity for the collision and the consequent sinking of the vessel and her cargo. It would be disastrous, say the defendants, if the Courts in India and the Court here come to differing conclusions despite facts arising from the same casualty. Furthermore, action has been taken to consolidate all the actions in Bombay but this would not be possible in respect of the plaintiffs' case here. Discovery proceedings in this action would be duplicating similar processes in India and the defendants would be put to unnecessary expenses.

The plaintiffs say that such an outcome is only a theoretical possibility. If stay is refused the Indian action will be withdrawn, since the plaintiffs genuinely desire Singapore litigation.

A writ was issued on 30 November 1988, in England by Alfred C Teopfer against the Shipping Corporation of India the owners of the "Vishva Abha". The plaintiffs there were owners of cargo loaded on board the vessel Dias and they claimed damages for loss and damages arising out of or occasioned by a collision between the vessel "Dias" and the "Vishva Abha".

Mr. Justice Sheen in his judgment, delivered on 16 March 1990, said:

> The action arises out of a collision which occurred in the Red Sea on 6 August 1987. The Court is not aware of any of the facts relevant to the question of liability for that collision. It was a collision which occurred, apparently, in good visibility and I have been told that the stem of Vishva Apurva, a sister ship of the ship which has been arrested, collided with the port side of Dias. Rather surprisingly it was Vishva Apurva which sank. I say "rather surprisingly" because, from what I have been told of the collision, it would seem that water might enter her forward compartments, and, perhaps, No. 1 hold; but water flooded other parts of the ship so that she sank. As a result of that disastrous collision, there is litigation in a number of different jurisdictions: Singapore, India, Holland, South Africa and at the moment in this country. However, the only relevant litigation so far as this motion is concerned is the litigation in South Africa. I say that because I am told that the actions in Singapore and Holland are actions brought by owners of cargo which was damaged by reason of the sinking of the ship, and although that was, in one sense, a consequence of the collision, it is said to have resulted from the ship being unseaworthy, a matter with which I am not concerned. Those actions are claims in contract by the cargo owners.

The plaintiffs say that there is a strong prospect that both the Courts in India and Singapore would find in favour of the owners of the cargo and no right to limit because there is fault and privity of the defendants.

For the foregoing reasons I dismissed the appeal.

Also found at [1991] 3 CLJ 1966